

**DISCLAIMER**

*This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).*

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, SEPTEMBER 27, 2002

PETITION OF

VIRGINIA ELECTRIC AND POWER COMPANY      CASE NO. PUE-2002-00181

and

DOMINION RETAIL, INC.

For an exemption of agreement for  
wholesale sales of power from the  
filing and prior approval  
requirements of Chapter 4, Title 56  
of the Code of Virginia or, in the  
alternative, for approval of  
wholesale power service agreement  
under Chapter 4, Title 56 of the Code  
of Virginia, and for expedited  
consideration

ORDER ON RECONSIDERATION

On April 1, 2002, Virginia Electric and Power Company  
("Dominion Virginia Power") and Dominion Retail, Inc.  
("Dominion Retail") (collectively, "Companies"), filed a  
petition with the State Corporation Commission ("Commission")  
under Chapter 4 (§ 56-76 et seq.) of Title 56 ("Chapter 4") of  
the Code of Virginia ("Code") for exemption from the prior  
approval and filing requirements thereof or, in the  
alternative, for approval of Dominion Virginia Power's  
wholesale sales of power at cost-based rates to Dominion  
Retail.

On June 28, 2002, the Commission issued an Order denying the Companies' request for an exemption from the filing and prior approval requirements of Chapter 4, and approving the proposed arrangement for wholesale sales subject to certain conditions. The Order of June 28, 2002, among other things, required the Companies to revise the Master Power Purchase and Sale Agreement ("Agreement") to include the following terms:

The Virginia State Corporation Commission has continuing supervisory control over the power agreements between Dominion Virginia Power and Dominion Retail and has the authority to exercise the provisions of §§ 56-78 and 56-80 of the Code of Virginia in the future with respect to such agreements and transactions thereunder, including the authority to terminate such agreements and transactions.

If the Virginia State Corporation Commission determines by order that this agreement and/or all agreements and transactions entered into hereunder must be terminated to protect and promote the public interest, then this agreement and/or all agreements and transactions entered into hereunder shall terminate 30 days after the date of the Virginia State Corporation Commission's order.

In addition, the Commission's approval under Chapter 4 was conditioned upon affirmative approval of the revised Agreement by the Federal Energy Regulatory Commission ("FERC").

On July 17, 2002, the Companies filed a Petition for Reconsideration. The Companies seek, among other things, reconsideration of the condition requiring revisions to the

Agreement. The Companies assert that, on advice of Dominion Virginia Power's FERC counsel, it is highly unlikely that FERC will issue the approval required by the Commission. The Companies state that this places them in an intolerable position, a jurisdictional "no man's land," where they cannot obtain state approval under Chapter 4 because a federal agency refuses to make certain findings regarding state jurisdiction. The Companies also state that they are unaware of any other Virginia utility that has been subject to the requirements imposed in this case.

In the Petition for Reconsideration, the Companies propose to remove the aforementioned condition requiring a revision to the Agreement, to stipulate that the Companies will exercise the termination provision in the existing Agreement if directed to do so by the Commission, and to agree not to assert that the Commission's issuance of a termination order is preempted. If the Commission rejects this proposal, the Companies request that the Commission require the following revisions to the Agreement, in lieu of those in the Order of June 28, 2002:

Subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission over the rates, terms and conditions of the agreement, the Virginia State Corporation Commission has continuing supervisory control over the power agreements between Dominion Virginia Power and Dominion Retail and has the authority to exercise the

provisions of §§ 56-78 and 56-80 of the Code of Virginia in the future with respect to such agreements and transactions thereunder, including the authority to require Dominion Virginia Power and Dominion Retail to terminate such agreements and transactions pursuant to the terms of such agreements and transactions.

If the Virginia State Corporation Commission determines by order that this agreement and/or all agreements and transactions entered into hereunder must be terminated to protect and promote the public interest, then Dominion Virginia Power and Dominion Retail shall terminate this agreement and/or all agreements and transactions entered into hereunder pursuant to the terms and conditions of such agreements, 30 days after the date of the Virginia State Corporation Commission's order.

The Companies also request that the Commission reconsider the condition requiring FERC to affirmatively approve the revisions to the Agreement and, rather, condition our approval on FERC's acceptance of the Agreement for filing. Finally, if the Commission requires revisions to the Agreement, the Companies further request that this docket remain open until FERC's review is completed due to the uncertainty of FERC approval and the potential need for further action by the Commission.

On July 18, 2002, the Commission issued an Order Granting Reconsideration and Suspending Prior Order. The July 18, 2002, Order granted reconsideration for purposes of continuing our jurisdiction over this proceeding, suspended our Order of

June 28, 2002, permitted Commission Staff ("Staff") and any party to file comments addressing the matters raised in the Petition for Reconsideration, and permitted the Companies to file a reply to the comments of Staff and any party. Staff filed comments opposing the Companies' requested changes to the order of June 28, 2002. On August 15, 2002, the Companies filed a Response to Staff Comments ("Response").

In their Response, the Companies assert that Staff's comments do not offer any basis to believe that FERC is likely to approve the required revisions to the Agreement. The Companies, among other things, note that the Commission recently approved wholesale transactions between Dominion Virginia Power and affiliated companies without mandating a similar condition requiring FERC recognition of the Commission's jurisdiction. The Companies again state that, to their knowledge, no other utility has been subject to the conditions required in this case. The Companies assert that the conditions imposed in this case will undermine the development of competition, as well as the Commission's jurisdictional role pursuant to Chapter 4 for all Virginia utilities engaged in wholesale transactions with affiliates.

The Companies also state that the proposed stipulations in the Petition for Reconsideration offer a practical method to provide further assurance as to the Commission's ability to

require the termination of the Agreement, if necessary, and to avoid a possible jurisdictional impasse that could not only jeopardize the proposed business relationship between the Companies, but could also create uncertainty for all wholesale transactions between Virginia utilities and their affiliates. If the Commission rejects the proposed stipulations, the Companies again request that the Commission adopt the modifications to the Agreement set forth in the Petition for Reconsideration.

NOW THE COMMISSION, having considered the pleadings and the applicable law, is of the opinion and finds as follows. As requested by the Companies, this docket shall remain open pending completion of FERC's review of the revised Agreement. We otherwise deny the Petition for Reconsideration.

As explained in our Order of June 28, 2002, § 56-80 of the Code provides that "the Commission shall have continuing supervisory control over the terms and conditions of such contracts and arrangements as are herein described so far as necessary to protect and promote the public interest" (emphasis added). That same section also requires that "[e]very order of the Commission approving any such contract or arrangement shall be expressly conditioned upon the reserved power of the Commission to revise and amend the terms and conditions thereof, if, when and as necessary to protect

and promote the public interest" (emphasis added). In addition, § 56-590 G of the Virginia Electric Utility Restructuring Act ("Act") states that, except as provided in § 56-590 B 5, nothing in the Act "shall be deemed to abrogate or modify the Commission's authority under Chapter 3 (§ 56-55 et seq.), 4 (§ 56-76 et seq.) or 5 (§ 56-88 et seq.)" of Title 56 (emphasis added).

The Companies previously stated in this case that the Commission "has continuing supervisory control over the power agreement between the Companies and has the authority to exercise the provisions of §§ 56-78 and 56-80 of the Code of Virginia in the future with respect to the agreement and transactions thereunder." In the Order of June 28, 2002, we concluded, as the Companies had, that if the Commission later determines continuation of such arrangement is no longer in the public interest, then the Commission should have the authority to take corrective action.

Accordingly, in the June 28, 2002, Order, we rejected requests by the Virginia Committee for Fair Utility Rates, Washington Gas Energy Services ("WGES"), and Staff to deny the Companies' proposed wholesale transactions. Rather, we approved the request subject to certain monitoring requirements and conditions to protect and promote the public interest. We found that, to protect and promote the public

interest, the Commission must retain authority over the arrangement pursuant to Chapter 4, including the authority to revoke our approval of such arrangement. Given the critical importance of our continuing jurisdiction over this particular arrangement and the sales of power proposed in this case, we required that recognition of such authority be included in the Agreement.

The Companies now assert, however, that FERC is "highly unlikely" to recognize this Commission's, and the Commonwealth's, continuing supervisory control over (including the authority to terminate) the Agreement. We have found that the Commonwealth's continuing authority is a necessary prerequisite for the Agreement to be in the public interest. Consequently, the Companies' suggestion, at this stage of the proceeding, that FERC may oppose that jurisdiction heightens the need for the Agreement to expressly recognize this Commission's authority under state law.<sup>1</sup>

---

<sup>1</sup> The Companies also request that approval herein be conditioned on FERC accepting the Agreement for filing, as opposed to FERC's affirmative approval of the Agreement. We deny this request as well. Acceptance for filing by FERC, in and of itself, does not constitute FERC's approval of the merits of such filing. For example, FERC may accept the Agreement for filing without granting approval of the terms contained therein. See, e.g., San Diego Gas & Elec. Co., Docket No. ER02-1647-000, Letter Order (June 25, 2002) ("This acceptance for filing shall not be construed as constituting approval of the referenced filing or of any rate, charge, classification or any rule, regulation or practice affecting such rate or service provided for in the filed documents. . .").



In an effort to address this situation, the Companies offer to stipulate to the Commission's continuing authority over the Agreement. Such a stipulation cannot confer jurisdiction to the Commonwealth or this Commission. In addition, the transactions under the Agreement will be part of the competitive wholesale market. Those transactions will not only impact the Companies, but may impact third parties - and such third parties would not be parties to the stipulation and could actively oppose this Commission's authority.<sup>2</sup>

The Companies also protest that, to their knowledge, no other utility has been subject to the conditions required in this case. The Companies are not being treated differently from similarly situated utilities. Rather, the facts and the proposed arrangement in this case present a different situation than those previously before the Commission. For example, Appalachian Power Company, Allegheny Power, and Delmarva Power & Light Company operate under arrangements that permit the utility to purchase wholesale power from an affiliate. These arrangements make power available to native load customers in Virginia and enhance reliability for those

---

<sup>2</sup> The Companies also agree not to assert, in any proceeding contesting the Commonwealth's authority, that the Commission's issuance of a termination order is preempted. The Companies' agreement in this regard, however, does not preclude other parties from contesting the Commission's jurisdiction to take continuing steps that may be necessary to protect and promote the public interest.

customers. In addition, the bulk of these utilities' physical generation assets serving Virginia consumers are located outside of Virginia.

In contrast, under the Agreement, Dominion Virginia Power will be selling power, as opposed to buying it. Dominion Virginia Power primarily relies upon its own generating units within the Commonwealth, as opposed to wholesale purchases, to serve Virginia retail customers. Dominion Virginia Power proposes to sell power to its affiliate for resale with no assurance that the power will be available in the Dominion Virginia Power service territory. Dominion Virginia Power's retail customers also benefit from an existing fuel factor margin-sharing mechanism, which may be negatively impacted by the proposed arrangement.

Under the circumstances in this case, we found it necessary for the Commonwealth's continuing authority to be recognized in the Agreement in order to protect and promote the public interest. As recognized in our Order of June 28, 2002, the Commission may be required to exercise this authority, for example, if needed to ensure the continued provision of reliable service to retail customers in the Commonwealth, to advance competition if the arrangement places Dominion Retail in a better position than its competitors to

successfully bid for Dominion Virginia Power's output,<sup>3</sup> or to protect Virginia retail customers from negative impacts on the fuel factor margin-sharing mechanism.

In addition, as noted by the Companies in their Response, we recently authorized wholesale transactions between Dominion Virginia Power and certain affiliates.<sup>4</sup> Indeed, our approval of proposed affiliate transactions in that case further illustrates that the Commission has based its review under Chapter 4 on the particular circumstances of each proposed arrangement. Under the approved transactions in that case, Dominion Virginia Power will purchase power from, as opposed to sell power to, its affiliates. In addition, those affiliates will sell power into Virginia from generating sources outside Dominion Virginia Power's service territory.

---

<sup>3</sup> For example, WGES expressed concern that the Companies' proposed bidding process does not ensure that the contemplated affiliate transactions will be conducted in a competitive and fair manner, and that the bidding process will place potential bidders at a significant disadvantage. In addition, a recent report prepared by the Staff of the FERC concludes that pricing discipline may be lost as a result of flaws in the bidding processes previously approved by FERC, and that the current FERC bidding requirements are not effective for short-time transactions. See Initial Report on Company-Specific Separate Proceedings and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies; Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (Aug. 2002). The Commission, however, has not denied the proposed wholesale agreement as a result of such concerns; rather, we seek to ensure the Commonwealth's ability to exercise authority over the arrangement if conditions warrant in the future.

<sup>4</sup> Petition of Virginia Electric and Power Company and Dominion Nuclear Marketing II, Inc., Pleasants Energy, LLC, Armstrong Energy Limited Partnership, L.L.L.P., and Troy Energy, LLC, Case No. PUA-2002-00002, Order on Reconsideration (July 18, 2002).

We found that Virginia retail customers of Dominion Virginia Power will benefit from the transactions, and that the transactions would provide Dominion Virginia Power with additional sources of generation to serve those customers. These transactions also should enhance reliability. Consistent with the discussion above, under these particular circumstances, we did not find it necessary to include explicit recognition of the Commonwealth's authority in the wholesale agreement in order to protect and promote the public interest.<sup>5</sup>

The Companies also present a request in the alternative. Specifically, if the Commission requires recognition in the Agreement of the Commonwealth's continuing authority, the Companies propose modifications to the required language. We reject the alternative language proposed by the Companies. The first phrase of the Companies' proposed revision is as follows: "Subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission over the rates, terms and conditions of the agreement" (emphasis added). The above phrase could render the remainder of the text, which

---

<sup>5</sup> The Companies also assert that the conditions imposed in the instant case will create uncertainty for all wholesale transactions between Virginia utilities and their affiliates. As explained above, however, the results of this case are based on the particular circumstances presented herein. The Commission will continue to look at each petition under Chapter 4 on its own merits.

acknowledges this Commission's continuing jurisdiction, meaningless. For example, the insertion of such phrase proposed by the Companies leaves unclear whether this Commission has the authority to terminate the Agreement if such is needed to protect the public interest, or whether that authority may later be deemed a "term" of the Agreement within the exclusive jurisdiction of FERC.<sup>6</sup>

Finally, the Companies request that this docket remain open until FERC's review is completed due to the uncertainty of FERC approval and the potential need for further action by the Commission. We grant this request. In this regard, the Companies and the Commission share a common goal - to ensure that the Commonwealth retains authority over the Agreement to protect Virginia consumers. Thus, we encourage the Companies to file the Agreement at FERC and to facilitate a timely resolution of this matter.

Accordingly, IT IS ORDERED THAT:

(1) Our prior suspension of the Order dated June 28, 2002, is hereby lifted.

---

<sup>6</sup> The Companies also propose alternative language suggesting that, as opposed to the Commission terminating the Agreement, the Commission could direct the Companies to terminate such. This proposal, however, does not establish that FERC would permit the Companies' proposed termination - at the direction of the Commission - of the Agreement and all agreements and transactions entered into under the same.

(2) The Petition for Reconsideration is granted, in part, in that this docket shall remain open pending completion of the Federal Energy Regulatory Commission's review of the revised Agreement.

(3) The Petition for Reconsideration is otherwise denied.

(4) This matter is continued pending further order of the Commission.